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Supreme Court, U.S.
FILED

AUG 25 2010

OFFICE OF THE CLERK

No. 10-289

In the
# Supreme Court of the United States

ALELAIDA HUMALA and
HUMBERTO HUMALA,
*Petitioners,*

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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August 25, 2010

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## QUESTION PRESENTED

Did the Third Circuit Court of Appeals deny the petitioners their fundamental rights to due process under the Fifth Amendment by affirming the decisions of the Board of Immigration Appeals in an egregious departure from the accepted and usual course of judicial proceedings?

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Adelaida Humala and Humberto Humala ask that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit, *Humala v. Attorney General of the United States*, Docket No., 08-2421 (3d Cir. 2010), is attached to this petition as **Appendix A**. The agency opinion issued by the Board of Immigration Appeals, *In re Adelaida Humala and Humberto Humala*, Nos. 074-951-729/730 (BIA April 15, 2008), is attached hereto as **Appendix B**.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered its judgment denying the timely submitted petition for rehearing on May 28, 2010. A petition for panel rehearing was denied on May 28, 2010, and is attached hereto as **Appendix C**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprives Mr. and Mrs. Humala of their rights as granted under the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which

Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the doctrine of equitable tolling of the 90 day time limit for filing a motion to reopen immigration proceedings. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. and Mrs. Humala's Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

Petitioners are natives and citizens of Ecuador. They first entered the United States in January 1995. Thereafter, Petitioner, Adelaida Humala, was selected as a beneficiary of the diversity visa lottery.

On March 8, 1996 Petitioners were granted adjustment of status through the diversity visa lottery. On May 31, 1996 they attended an interview before the consular office in Ecuador wherein they were seeking visas to bring their children to the United States.

During the interview Petitioner Adelaida Humala admitted that she had not graduated from high school

and had submitted a fraudulent document to establish eligibility for the diversity visa lottery.[1]

On September 26, 2003 Petitioners were placed in removal proceedings by the issuance of a notice to appear, in which Petitioner Adelaida Humala, was charged with obtaining adjustment of status by willfully misrepresenting a material fact.

While Mrs. Humala denied the charge, Judge Miesner sustained the charge of removability. However, during the course of the proceedings, he discussed with Petitioners' counsel the possibility of a waiver.

On August 27, 2004, Immigration Judge Miesner asked Petitioners' counsel, Attorney Fernandez, if Petitioners had a qualifying relative which would allow them to file a waiver application (to waive the ground of inadmissibility). Although Petitioners advised counsel that Mrs. Humala's mother was about to become a permanent resident, Mr. Fernandez told the Immigration Judge no, because he mistakenly thought that a qualifying relative had to be a U.S. citizen.

On August 27, 2004, the Immigration Judge issued a decision denying Petitioners' requests for relief and ordering them removed to Ecuador.

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[1] During the time of the adjustment of status interview, although Mrs. Humala did not graduate from high school, she had enough work experience to qualify for permanent resident status through the diversity visa lottery.

In October 2004, Mrs. Humala's mother became a permanent resident of the United States.

As a result of counsel, Regis Fernandez' incorrect explanation of the law regarding eligibility for a waiver, clients pursued an appeal of this matter based upon their assertion that Mrs. Humala's misrepresentation was not material.

On December 27, 2005, the Board of Immigration Appeals affirmed the Immigration Judge's decision. On January 26, 2006, Petitioners filed a pro-se petition for review with the Third Circuit Court of Appeals. On September 29, 2006, the petition for review was denied.

During the entire period of time Petitioners were not aware that a qualifying relative for a waiver application could be a permanent resident. If they had known, they could have filed a motion to remand with the BIA anytime after October 2004 until the BIA's decision in December 2005. However, they believed their counsel at that time that the qualifying relative had to be a United States citizen.

On October 24, 2007 Petitioners retained new counsel. This attorney uncovered the "ineffective assistance" of prior counsel.

Then, new counsel, Andrew L. Friedman, working without delay, on November 5, 2007, filed a grievance against prior counsel Fernandez and a motion to reopen was filed on November 9, 2007.

The motion to reopen was denied by the BIA as untimely. Although the BIA acknowledged that the

ineffective assistance may warrant "equitable tolling" of the 90 day time limit for filing a motion to reopen, in this case, petitioners had not shown due diligence for the period of time "in which the ineffective assistance is, or should have been, discovered by a reasonable person." *See* **Appendix B**, pg. 14a.

The Third Circuit erroneously upheld this decision, finding that the Board of Immigration Appeals did not abuse it's discretion in its decision. *See* Appendix A.

## REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings.

Claims of ineffective assistance of counsel satisfy the general requirement that motions to reopen present "new facts" that are material and [were] not available and could not have been discovered at the former hearing." 8 C.F.R. Section 1003.23 (b)(3). Under normal circumstances, the filing deadline for a motion to reopen is 90 days after completion of proceedings and only one such motion is permitted. However, many Circuit Courts of Appeal have determined that equitable tolling applies to this period and numeric limitation.

This matter was before the Third Circuit Court of Appeals after the Board of Immigration Appeals denied Petitioners' motion to reopen as untimely. Substantial evidence did not support the decision of the BIA to deny the motion to reopen when the lead petitioner demonstrated that equitable tolling was warranted in light of ineffective assistance of counsel.

Generally, a motion to reopen submitted to the Board of Immigration Appeals or an Immigration Judge must be submitted no later than ninety (90) days following the entry of the last and final administrative order entered in the proceedings. *See* 8 C.F.R. § 1003.2(c)(2). However, most Courts of Appeal, including the Court of Appeals for the Third Circuit, have found that, in circumstances where an applicant has been a victim of ineffective assistance of counsel, the time period for filing a motion to reopen may be equitably tolled. However, there is a dispute among the Circuits regarding how to calculate the tolling period.

The Second Circuit, in Iavorski v. U.S. INS, 232 F.3d 124 (2000), cert. denied, 2001 U.S. LEXIS 5490 (2001), held that the filing deadline for motions to reopen a removal proceeding may be equitably tolled based on the ineffective assistance of counsel, reasoning that it had found no evidence that Congress intended to create a jurisdictional bar to such motions. Id. at 132. However, it also found that Iavorski had not exercised due diligence during the two-year period that he sought to have tolled. Id. at 134.

In *Afanwi v. Mukasey*, 526 F.3d 788 (2008), the Fourth Circuit denied a motion to re-open based on the ineffective assistance of counsel, who had failed to check his mail until it was too late to file a petition for judicial review. While acknowledging that other courts of appeals, including the Second Circuit in Iavorski, would allow the possibility of a motion to re-open based on ineffective assistance, the panel rejected those holdings, concluding instead that "retained counsel's ineffectiveness in a removal proceeding

cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing."

The Seventh Circuit, in *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005), affirmed a motion to reopen filed almost nine months late in part because the respondent "is a foreigner who may, therefore, have more than the average difficulty in negotiating the shoals of American law."

The Ninth Circuit, in Ghahremani v. Gonzales, 498 F. 3d 993, (9th Cir. 2007), held that Ghahremani exercised due diligence during the period prior to when he definitively learned of his prior counsel's potential ineffectiveness. They further concluded that the "ninety-day filing deadline therefore should have been begun to run" once he learned of his prior counsel's ineffectiveness. In calculating what constituted due diligence, the Court concluded that "Ghahremani's motion to reopen, which was filed on May 28, 2004, less than ninety days later, was therefore timely." The Ninth Circuit, therefore adopted the rule that the period for filing a motion to reopen, which is 90 days, does not begin to run until an alien becomes aware of the ineffective assistance of counsel.

This decision contrasts with Seventh Circuit conclusions that, because equitable tolling permits a plaintiff to delay filing suit beyond the statute of limitations if, despite due diligence on his part, he cannot obtain the information he needs in order to determine, in time to sue within the deadline, whether he has a claim on which a suit can be founded *Yuan Gao v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008). However, according to the Seventh Circuit, equitable tolling does not reset the clock.

In *Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005) the Court found that alleged ineffective assistance of counsel can serve as a basis for equitable tolling, if substantiated and accompanied by a showing of due diligence. However, the Third Circuit has not determined the issue of how long an alien has to make a motion to reopen once the ineffective assistance of counsel is discovered.

The Supreme Court has noted,

> An alien facing deportation generally is unfamiliar with the arcane system of immigration law, is often unskilled in the English language, and sometimes is uneducated; for these reasons, "deportation hearings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel." (38)

Ardestani v. INS, 502 U.S. 129, 146 (1991) (quoting Escobar Ruiz v. INS, 838 F.2d 1020, 1026 (9th Cir. 1988) (en banc)).

Petitioners seek a writ of certiorari so that this Court can determine a definitive bright line rule for the determination of a tolling period once there has been a discovery of ineffective assistance of counsel. A bright line rule which resets the ninety day limit beginning on the date that the ineffective assistance of counsel is discovered or should have been discovered would provide guidance that could be used by aliens and their counsel, and eliminate the guessing game that now occurs in some jurisdictions as to what is a

reasonable time to file a motion to reopen after such a discovery.

Petitioners also seek a writ of certiorari to reverse the clear error of the BIA and Third Circuit in their determination as to when the ineffective assistance of counsel should have been discovered in this case.

Therefore, in determining whether equitable tolling is proper in this case, the following questions need to be answered[2]:

(1) When did Petitioners discover former attorney's "ineffective assistance"?
(2) Should they have discovered it sooner?
(3) What actions did they take to preserve their rights once the "ineffective assistance was discovered?
(4) Under the circumstances, did Petitioners act with due diligence, such that their delay in filing their motion to reopen should be equitably tolled?

In answer to the first question, Petitioners' uncontroverted assertion is that the "ineffective assistance" of prior counsel was discovered by Attorney Andrew Friedman, who they retained on October 27, 2007. Then, the time elapsed from discovery of the "ineffective assistance" to the filing of the MTR was two months. It cannot be disputed that once Petitioners discovered the "ineffective assistance", they acted with great haste in seeking to correct the error

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[2] The BIA decision assumed, for the purpose of its decision that Petitioners were victims of ineffective assistance of counsel.

of former counsel. The question remains; however, as to whether they should have discovered prior counsel's "ineffective assistance" sooner.

The Third Circuit denied the within petition for review on the basis that Petitioners either knew or should have known that their previous counsel had provided "ineffective assistance" long before they retained Mr. Friedman. The Third Circuit points to the Immigration Judge's decision, wherein he clearly stated that Petitioners were not eligible for a waiver because they do not have "parents, spouse or children in the United States who are American Citizens or lawful permanent residents so as to qualify for such a waiver."

It is Petitioners' contention that the oral decision, which was rendered in English, did not provide them with actual notice of prior counsel's ineffective assistance. The record reflects that the Immigration Judge read his decision as an interpreter tried to translate it. Usually, translators are forced to summarize and simplify as the decisions are technical, citing case law, statutes and regulations.

In addition, once it becomes clear that an application will be denied, aliens often become despondent and do not really listen to the translator. It is unlikely the above quote was properly translated by the interpreter; and even if it was, it is unlikely that Petitioners understood the significance of what was being said to them. In immigration proceedings, as in other litigation, aliens rely on counsel to explain the decision to them. Unfortunately, Petitioners' counsel was ineffective.

Petitioners only found out that they had been incorrectly advised fortuitously when they consulted another attorney almost two years later to ask if there was anything they could do to remain in the United States.

Under the circumstances of this case, it not correct to say that petitioners should have found out sooner that their counsel had provided them with 'ineffective assistance." Petitioners discovered the ineffective assistance in October 2007, and two months later filed the MTR. This is due diligence, and should result in the equitable tolling of the 90 day period for filing a motion to reopen. At the point where the "ineffective assistance" was discovered, the 90 day time requirement should begin, making a timely motion due before the period expires in January 2008.

Without clear guidance from this Court, persons such as the Humalas will be able to determine the time period they in which they must make a motion to correct an error made by a prior counsel.

## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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## APPENDIX A

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No. 08-2421**

**[Filed April 7, 2010]**

| | |
|---|---|
| ADELAIDA HUMALA; HUMBERTO HUMALA, | ) |
| Petitioners | ) |
| v. | ) |
| ATTORNEY GENERAL OF THE UNITED STATES, | ) |
| Respondent | ) |

On Petition for Review of a Decision and Order of the Board of Immigration Appeals
(BIA Nos. A74-951-729, A74-951-730)

Submitted Under Third Circuit LAR 34.1(a)
February 23, 2010

Before: SCIRICA, Chief Judge, CHAGARES, Circuit Judge, and RODRIGUEZ, District Judge.*

(Filed: April 7, 2010)

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OPINION OF THE COURT

CHAGARES, Circuit Judge.

Petitioners Humberto Humala ("Mr. Humala") and Adelaida Humala ("Mrs. Humala") petition for review of the decision of the Board of Immigration Appeals ("BIA") denying their motion to reopen their removal proceedings. We will deny the petition.

I.

Because we write solely for the benefit of the parties, we will only briefly summarize the essential facts. Petitioners are natives and citizens of Ecuador. They first entered the United States in January 1995. Thereafter, Mrs. Humala was selected for the Diversity Immigrant Visa Program. In support of her application for this program, Mrs. Humala submitted fraudulent documentation representing that she had graduated from high school. According to Mrs. Humala, her attorney advised her that she would need this documentation to be eligible for the program and helped her procure a falsified high school diploma. On

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* The Honorable Joseph H. Rodriguez, Senior District Judge for the District of New Jersey, sitting by designation.

March 8, 1996, both petitioners obtained an adjustment of status to lawful permanent resident.[1]

Shortly thereafter, petitioners returned to Ecuador, where they attempted to apply for immigrant visas for their children. During an interview with a consular officer, Mrs. Humala admitted that she had not graduated from high school and that she submitted the fraudulent documentation to establish eligibility for the Diversity Immigrant Visa Program.

On September 26, 2003, the Department of Homeland Security ("DHS") served petitioners with Notices to Appear in Immigration Court. DHS charged Mrs. Humala with removability under section 212(a)(1)(A) of the Immigration and Naturalization Act ("INA"), as amended, 8 U.S.C. § 1227(a)(1)(A), as an alien who was inadmissible at the time of her adjustment of status because she obtained an immigration benefit through fraud or wilful misrepresentation. Joint Appendix ("J.A.") 558. DHS charged Mr. Humala with removability under section 212(a)(1)(A) as an alien who had obtained an adjustment of status without valid documents. J.A. 629.

Petitioners appeared before an Immigration Judge ("IJ"), represented by their attorney. On August 27, 2004, the IJ denied petitioners' requests for relief and ordered them removed to Ecuador. J.A. 318. The IJ found that Mrs. Humala had obtained eligibility for the Diversity Immigrant Visa Program by "willfully

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[1] Mr. Humala's adjustment of status was derivative of his wife's application for the Diversity Immigrant Visa Program.

misrepresenting a material fact, that is, that she was a high school graduate when she was not," and by submitting a "fraudulent high school diploma." J.A. 346-47. He thus concluded that Mrs. Humala was inadmissible under INA section 212(a)(6)(C)(I), 8 U.S.C. § 1182(a)(6)(C)(I), and ineligible for a waiver under section 212(k), 8 U.S.C. §1182(k). J.A. 349-50. Because Mr. Humala's application for adjustment of status was based on Mrs. Humala's eligibility for the Diversity Immigrant Visa Program, he concluded that Mr. Humala was inadmissible under section 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I). Id. The IJ also noted that the petitioners "do not have parents, [a] spouse or children in the United States who are American citizens or lawful permanent residents so as to qualify" for a waiver under INA section 212(i), 8 U.S.C. § 1182(i), or section 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H). J.A. 347.

Petitioners, still represented by their attorney, appealed the IJ's decision. On December 27, 2005, the BIA dismissed the appeal, adopting and affirming the IJ's decision. J.A. 268. Petitioners filed a petition for review, pro se, which a panel of this court denied on September 29, 2006. See J.A. 139-42.

On October 24, 2007, petitioners obtained new counsel, who submitted a motion to reopen petitioners' removal proceedings on October 30, 2007. In this motion, petitioners argued that their prior counsel provided ineffective assistance by misinforming them that Mrs. Humala could not obtain a fraud waiver under INA section 237(a)(1)(H) based on the immigration status of her mother, who "was in the process of obtaining her lawful permanent residence," because her mother was not a U.S. citizen. J.A. 19.

Petitioners argued that prior counsel should have notified the Immigration Court that Mrs. Humala's mother was in the process of obtaining her lawful permanent resident status, sought a continuance to allow this process to be completed, and then applied for a section 237(a)(1)(H) waiver. J.A. 20.

On April 15, 2008, the BIA denied petitioners' motion, noting that it was filed after the applicable deadline had expired and concluding that petitioners had failed to exercise diligence in pursuing their case. J.A. 2-3. The BIA reasoned that the IJ had accurately explained the requirements for a section 237(a)(1)(H) waiver during the oral decision on August 27, 2004, and that a reasonable person in Mrs. Humala's situation "would have taken some action to attempt to place before the Immigration Judge or this Board the change in the status of her mother's status." J.A. 3. The BIA concluded that because petitioners waited nearly two years to file the motion to reopen, they failed to exercise diligence. Id.

On May 12, 2008, petitioners filed a timely petition for review.

II.

We have jurisdiction pursuant to 8 U.S.C. § 1252(a), and we review the BIA's decision to deny petitioners' motion to reopen for abuse of discretion. See Mahmood v. Gonzales, 427 F.3d 248, 250 (3d Cir. 2005). Because the Attorney General has broad discretion to grant or deny a motion to reopen, our review is "highly deferential." Guo v. Ashcroft, 386 F.3d 556, 562 (3d Cir. 2004) (citing INS v. Doherty, 502 U.S. 314, 323 (1992)). "'Discretionary decisions of

the [BIA] will not be disturbed unless they are found to be arbitrary, irrational, or contrary to law.'" Id. (quoting Tipu v. INS, 20 F.3d 580, 582 (3d Cir. 1994)).

III.

Petitioners argue that the BIA abused its discretion in denying as untimely their motion to reopen.[2] Petitioners concede that their motion was untimely but argue that the filing deadline should have been equitably tolled based on prior counsel's ineffective assistance. In general, a motion to reopen removal proceedings must be filed within ninety days of the date of entry of a final administrative order of removal. 8 U.S.C. § 1229a(c)(7)(C)(I). Ineffective assistance of counsel may provide a basis for equitable tolling of this filing deadline, but the petitioner must demonstrate diligence in pursuing his case. Mahmood, 427 F.3d at 249, 252-53. In Mahmood, we held that a petitioner who failed to account for periods of time during which he failed to pursue his case had not exercised diligence and was therefore ineligible for equitable tolling. Although the petitioner was a "foreigner who may . . . have more than the average difficulty in negotiating the shoals of American law," equitable tolling is "an extraordinary remedy which should be extended only sparingly." Id. at 253 (citations and internal quotation marks omitted). Significant periods of "unaccounted-for delay" indicate a lack of diligence that renders equitable tolling inappropriate. Id.

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[2] Petitioners also challenge the merits of the IJ's decision, which was adopted by the BIA. A panel of this court denied a previous petition challenging this decision, and the only issue currently before the Court is whether the BIA abused its discretion by denying petitioners' motion to reopen removal proceedings.

In this case, the administrative removal order became final on December 27, 2005, but petitioners did not file a motion to reopen until October 30, 2007. Following the December 27, 2005 order, petitioners made an initial effort to pursue their case by filing a pro se petition for review. After this petition was denied on September 29, 2006, however, petitioners did not take any additional steps to pursue their case until October 2007, when they contacted new counsel, who prepared the motion to reopen. Given that the IJ provided petitioners with an accurate description of the requirements for a section 237(a)(1)(H) waiver on August 27, 2004, we agree that this unaccounted-for period of delay indicates a lack of diligence. The BIA did not abuse its discretion in denying petitioners' motion to reopen as untimely.

IV.

For these reasons, the petition for review will be denied.

# UNITED STATES COURT OF APPEALS
# FOR THE THIRD CIRCUIT

**No. 08-2421**

**[Filed April 7, 2010]**

| | |
|---|---|
| ADELAIDA HUMALA; HUMBERTO HUMALA, | ) |
| Petitioners | ) |
| v. | ) |
| ATTORNEY GENERAL OF THE UNITED STATES, | ) |
| Respondent | ) |

On Petition for Review of a Decision and Order of the Board of Immigration Appeals
(BIA Nos. A74-951-729, A74-951-730)

Submitted Under Third Circuit LAR 34.1(a)
February 23, 2010

Before: SCIRICA, Chief Judge, CHAGARES, Circuit Judge, and RODRIGUEZ, District Judge.*

* The Honorable Joseph H. Rodriguez, Senior District Judge for the District of New Jersey, sitting by designation.

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JUDGMENT

This cause came on to be heard on the record from the Board of Immigration Appeals and was submitted pursuant to Third Circuit LAR 34.1(a) on February 23, 2010. After careful review and consideration of all contentions raised by petitioners and respondent, it is hereby ORDERED and ADJUDGED that petitioners' petition for review of the decision of the BIA entered on April 15, 2008, be and is hereby DENIED. All in accordance with the opinion of this Court.

Attest:

/s/Marcia M. Waldron
Clerk

DATED: April 7, 2010

## APPENDIX B

[SEAL]

**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Friedman, Andrew L**
**164 West 25th Street, Suite 7F**
**New York, NY 10001**

**Office of Chief Counsel – ICE/NEW**
**970 Broad Street – Room 1104B**
**Newark, NJ 07102**

**Name: HUMALA, ADELAIDA** **A74-951-729**
**Riders: 74-951-730**

**Date of this notice: 4/15/2008**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Snow, Thomas G

**U.S. Department of Justice**
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

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File: A74 951 729 - Newark, NJ
A74 751 730

Date: APR 15 2008

In re: ADELAIDA HUMALA[1]
HUMBERTO HUMALA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Andrew L. Friedman, Esquire

APPLICATION: Motion to reopen

This case was last before us on December 27, 2005, when we adopted and affirmed the Immigration Judge's decision dated August 27, 2004, denying the respondents' applications for termination and ordering their removal. A motion to reopen was filed on November 9, 2007. The motion will be denied.

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[1] The respondents are husband and wife-both are natives and citizens of Ecuador.

The female lead respondent filed the instant motion to reopen these proceedings based on a claim of ineffective assistance of counsel. The motion will be denied because it was not filed within the statutory and regulatory 90-day time limit for filing a motion to reopen. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 C.F.R. § 1003.2(c)(2).

However, because this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit and the respondent presents an ineffective assistance of counsel claim, we will consider whether this case warrants equitable tolling of the time limits on motions to reopen. *See Mahmood v. Gonzales*, 427 F.3d 248, 250 (3rd Cir. 2005)(equitable tolling of the 90-day motions deadline requires a showing of due diligence). The instant motion, filed after the issuance of a final administrative order, is based on prior counsel's alleged failure to request a continuance at the original hearing because the respondent's mother had a pending application for adjustment of status which, when granted, would enable the respondent to file for a waiver of the ground of deportation owing to her mother's status as a lawful permanent resident. *See* section 237(a)(1)(H) of the Act. 8 U.S.C. 1227(a)(1)(H). The respondent's mother became a lawful permanent resident in October 2004.

The respondent's statement does not indicate when she first found out about her counsel's alleged error. However, the decision of the Immigration Judge correctly states the law as to the waiver's requirements and such was read from the bench on August 27, 2004 (I.J. at 12). Additionally, the respondent retained another attorney for purposes of filing an appeal to the Third Circuit Court of Appeals

and consequently had the opportunity to seek legal advice on this issue.

When ineffective assistance of counsel is cited to excuse a missed filing deadline, a respondent who seeks equitable tolling bears the burden of demonstrating her own due diligence for any period in which the ineffective assistance is, or should have been, discovered by a reasonable person. In the respondent's situation, we need not determine precisely when the ineffectiveness of the respondent's original counsel was or should have been discovered by a reasonable person in her situation as it is sufficient to observe that a reasonable person would have taken some action to attempt to place before the Immigration Judge or this Board the change in the status of her mother. We note that the respondent could have filed a motion to reopen to this Board while her petition was before the Court of Appeals. Finally, we note that there is no explanation why the respondent waited almost 2 years to file the motion. For these reasons, the respondent's claim fails for lack of diligence in investigating and bringing the claim.

Accordingly, the following order is entered.

ORDER: The motion is denied.

/s/ Thomas G. Snow
FOR THE BOARD

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**No. 08-2421**

**[Filed May 28, 2010]**

| | |
|---|---|
| ADELAIDA HUMALA; HUMBERTO HUMALA, Petitioners | ) |
| v. | ) |
| ATTORNEY GENERAL OF THE UNITED STATES, Respondent | ) |

SUR PETITION FOR REHEARING

Present: SCIRICA and CHAGARES, Circuit Judges, and RODRIGUEZ*, District Judge

* The Honorable Joseph H. Rodriguez, Senior District Judge for the District of New Jersey, sitting by designation.

The petition for panel rehearing filed by petitioners, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/ Michael A. Chagares
Circuit Judge

DATED: May 28, 2010
tmk/cc: Paul F. Stone, Esq.
Corey L. Farrell, Esq.
Charles Cgristophe, Esq.